Commission d'accès à l'information du Québec

Feedback Document

Consultation on the Draft 2023-1 Guidelines on the Criteria for Valid Consent

October 31, 2023

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

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Table of Contents

About this document 1

1. Overview of the consultation process 2

Components 2
Themes 2
Dissemination 3
Respondents 3
Public component – Questionnaire 3
Targeted component – Briefs 3
Analysis of the comments 4

2. Comment highlights and CAI's responses 5

Respondents' assessment of the questionnaire 5
Main comments and CAI's responses 6
General comments 7
Comments on the introduction and the general presentation of the criteria 11
Comments on express nature 15
Comments on free nature 18
Comments on informed nature 19
Comments on specific nature 20
Comments on granular nature 21
Comments on understandable nature 22
Comments on temporary nature 22
Comments on separate nature 23
Comments on the examples 24

3. Next steps 27

Appendix 1 – List of briefs received 28

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About this document

This document summarizes the main comments made on the Commission d'accès à l'information (CAI) Draft 2023-1 Guidelines on the Criteria for Valid Consent during the associated public consultation.[1]

In keeping with its commitment, CAI carefully and thoroughly analyzed the comments received. However, for the sake of brevity and clarity, only the most recurring or significant proposals are dealt with in this summary. CAI presents them anonymously and indicates whether and how it will act on them.

Appendix 1 of this document also lists the briefs submitted by all stakeholders.

CAI would like to thank all those who submitted comments for the quality of their contributions and the time they invested in this exercise.

The final version of the guidelines is now available on the CAI website.

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1 The consultation also provided an opportunity to suggest ideas for future CAI guidelines. That aspect is not covered in this document.

1. Overview of the consultation process

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CAI held a public consultation on its Draft 2023-1 Guidelines on the Criteria for Valid Consent (the "guidelines") for a period of seven weeks, from May 16 to July 2, 2023. The guidelines are intended to facilitate the application of sections relating to valid consent in the following acts:

- *Act respecting Access to documents held by public bodies and the Protection of personal information*
- *Act respecting the protection of personal information in the private sector*

They take into account these acts, **including** the amendments introduced by Bill 25, which essentially came into force on September 22, 2023.

Components

The consultation consisted of two components based on target audience:

1. **General public, individuals and organizations subject to the legislation:** A questionnaire was made available on the Consultation Québec platform. It allowed for brief comments on the proposed text, using evaluation questions and limited text fields.
2. **Pre-identified stakeholders:** Stakeholders targeted for their expertise, representativeness or the importance of their activities submitted briefs.

Themes

Respondents in both components of the consultation were asked to:

- Provide an **overall assessment** of the guidelines
- Comment on the **legal validity** and **consistency** of the guidelines
- Assess whether the **scope** of the guidelines was adequate for their purpose and whether they were **complete**
- Comment on the **practical application** of the guidelines and how **realistic** they are
- Comment on the **usefulness and credibility of the examples** provided
- Comment on the **format** and **clarity of the text** of the guidelines

Dissemination

The consultation was announced on the CAI website, on the Consultation Québec platform, on social networks and via targeted emails to various associations and multipliers.

Respondents

A total of **50 individuals and organizations** took part in the consultation. The CAI team identified around **570 comments or proposals** (some of them identical) through their contributions.

For the most part, CAI received comments from organizations, most of which came from the private sector.

Public component – Questionnaire

A total of 28 respondents completed the questionnaire on the Consultation Québec platform. The majority (23/28) commented on the guidelines on behalf of an organization, the others on their own behalf. Among the organizations:

- 18 were based in Quebec and 5 in the rest of Canada
- 9 were public bodies and 8 were businesses; the remaining 6 were business or professional associations or NPOs
- In addition to government, the sectors represented were varied (e.g., finance, transportation, philanthropy, technology, investigative services, retail)
- 8 were large organizations (500 or more employees), 6 were medium-sized organizations (100 to 499 employees) and 6 were small organizations (fewer than 99 employees); the remainder did not provide any order of magnitude

Targeted component – Briefs

A total of 19 organizations submitted briefs by invitation,[2] a list of which can be found in Appendix 1. Among them:

- 5 were in the public sector or represented public organizations
- 2 were civil society organizations
- 1 was a group of academic experts
- 11 were specialized law firms or private-sector associations

Three additional "brief-type" contributions were received from private-sector organizations by other means, including transmission to the chair, an invitation to attend (without intervening in) a virtual workshop to discuss the guidelines, and the inclusion of links to more detailed responses in a questionnaire.

[2] A larger number of invitations was sent out, but only a fraction of organizations responded. In addition, some organizations approached CAI directly to take part in the targeted consultation and were formally allowed to do so.

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In its notice of consultation, CAI had announced that it would not examine any unsolicited briefs. However, these guidelines are much anticipated, and there are a number of concerns about the coming into force of the new provisions of Bill 25. In this context, CAI felt it would be passing up an opportunity if it dispensed with these additional views. After careful consideration, it decided to take them into account in the same way as the other briefs.

In fairness to the other participants in the consultation and for the sake of transparency, CAI is also making these contributions public in Appendix 1.

Analysis of the comments

CAI set up a committee of professionals from different departments to analyze each contribution, whether it be a questionnaire or a brief. Each was read by at least two people from different departments. The reviewers extracted comments by mutual agreement. The committee then grouped the comments by theme to identify points of convergence and divergence.

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2. Comment highlights and CAI's responses

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CAI analyzed all the comments received from respondents. This section provides an overview of the respondents' assessment of the questionnaire, followed by the main comments and CAI's response to each. It indicates whether or not any changes were made to the guidelines, and the reasons behind those choices.

Comments that went beyond the scope of the consultation were noted for future reference. CAI may use them at a later date to support some of its thinking on its support tools, for example.

Respondents' assessment of the questionnaire

The questionnaire consisted of closed-ended questions to rate agreement with statements on a four-level scale.

Only four of the five questionnaires completed by individuals included quantified assessments. This number is too small to provide details on their assessment.

In terms of the 23 questionnaires completed on behalf of organizations, although the number of respondents was too small to go any further in statistical analysis, one thing was clear: **generally speaking, respondents from the private sector were less satisfied than those from the public sector**. As a result:

- 69% (9/13) of them gave the guidelines a negative review, compared to 11% (1/9) of those from the public sector
- 92% (12/13) of them felt the guidelines were incomplete, compared to 33% (3/9) of those from the public sector
- They expressed strong reservations about the sections on the strength of the guidelines and demonstrability, as well as the guidelines on express, free, informed and granular consent, whereas the majority of those from the public sector rated all sections positively
- 58% (7/12[3]) of them rated the usefulness and credibility of the examples negatively, compared to 11% (1/9) of those from the public sector

It should be noted that these findings reflect only the feedback provided in the questionnaires submitted by 23 organizations and are not necessarily representative of the briefs. Stakeholders who submitted briefs did not formally quantify their overall assessment. However, CAI notes that these broad trends reflect the recurrence of some comments throughout the briefs received.

3 Not every stakeholder necessarily answered all the questions, which explains the variation in the total.

Main comments and CAI's responses

This section presents the comments submitted to CAI. Since this is a summary document, it is not possible to discuss each one in detail. They were therefore grouped by major theme, particularly on the basis of their recurrence and where they raised issues of application or legal consistency. They have been reworded for clarity and brevity.

Minor changes made to the guidelines in response to comments are not covered in this document.

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General comments

General comments	Responses
1. The guidelines are **too prescriptive**. According to the law, they must only be intended to "facilitate the application" of legislation. However, CAI seems to be creating new legal obligations or standards. Furthermore, it does not indicate how it intends to take into account compliance or non-compliance with the guidelines when setting the amount of any fines or administrative monetary penalties.	CAI's intention with these guidelines is indeed to facilitate the application of the law. As such, it provides clarity on provisions that are more difficult to understand and apply. This is based on an analysis of relevant sections and case law. Keep in mind that, while Bill 25 introduced some changes, consent and many of its validity criteria were already present in existing legislation. This exercise, difficult and technical by nature, is not within the reach of all organizations. CAI's role is to clarify the law's grey areas and specify the requirements applicable in the majority of situations. In this sense, the guidelines will indeed facilitate the work of many organizations, which can use them to better understand the law and adapt their activities accordingly. In short, the guidelines are not mandatory, but should be used as a guide. **For the sake of clarity, the explanation of the scope and objectives of the guidelines has been adjusted. This information was placed at the beginning of the document.** In addition to obligations, the guidelines also identify best practices that can better protect the rights of those concerned. CAI presents them to inspire organizations but does not prescribe them. **To more clearly reflect this fact, practices arising directly from a legal obligation are now presented with the verb "must" in the present tense. Best practices are usually presented with the verbs "should" or "may."**
2. An **English translation** should be proposed to make the document accessible to as many people as possible, especially as it applies to companies outside Quebec.	CAI appreciates the interest in these guidelines outside Quebec, especially since the private sector legislation applies to many companies established elsewhere. However, it must respect the government's language policy and the provisions of the *Charter of the French Language*. **It cannot translate this document, which is essentially intended for legal entities doing business in Quebec, without contravening the applicable provisions.**

2 – Comment highlights and CAI's responses

CAI

General comments	Responses
3. A number of sectors or types of organizations are asking CAI for **more precise guidelines, or even exceptions, specific to their activities**, such as researchers, NPOs, marketing companies, players in the automotive sector, etc.	CAI understands that compliance with the law can present particular challenges in certain areas or for certain types of organizations. **However, these guidelines are meant to be general. In the future, CAI could consider the possibility of providing more precise guidelines for certain sectors.**
4. The guidelines should provide clear guidance on all **exceptions to consent**, which are fundamental to organizations.	The guidelines make it clear from the outset that they do not focus in detail on *situations* where consent is required, but rather on the applicable criteria *when* it is required. **In the future, CAI could consider the possibility of setting out specific guidelines for this area.**
5. The guidelines should contain specific guidance on the **consent of minors**.	While this is an important topic covered by the new provisions, CAI considers that it is beyond the scope of these guidelines. **It could consider the possibility of setting out guidelines for it in the future.**
6. The guidelines should provide additional guidance on **necessity**.	CAI believes that further explanation of this issue would be beyond the desired scope of the guidelines. **However, it does agree that there is a need for clearer guidance on necessity and could consider the possibility of setting out guidelines for it in the future.**
7. The guidelines should provide further guidance on the **duty to assist.**	Although this is an important topic covered by the new provisions, CAI considers that it falls outside the specific scope of the criteria for valid consent. **It could consider the possibility of setting out guidelines for it in the future.**

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

2 – Comment highlights and CAI's responses

CAI

General comments	Responses
8. CAI should **ease the burden on organizations with respect to Bill 25** by delaying its application or exempting organizations from certain obligations, for example.	**CAI does not have the power to delay the application of the law or exempt organizations from it.** These comments are directed more to lawmakers. However, CAI will continue to demonstrate proportionality in its oversight activities by raising awareness when the context requires it.
9. CAI should state verbatim that the guidelines **will not be applicable for a certain period of time**.	As noted above, CAI has made changes to clarify that the guidelines are a non-binding document intended to facilitate the application of the law. **In this context, CAI considers that such a reference is not necessary.**
10. The guidelines should be **clarified** by, for example: • Avoiding repetition of information in a number of sections • Using the same terms as the law • Simplifying the legal content CAI should offer **practical tools** (videos, tables, charts, templates, etc.) or **a summary** to facilitate understanding.	Drafting a document that specifies the law's provisions in a way that is both accessible to all organizations, yet exhaustive enough to interest experts, is a major challenge. In an attempt to meet both needs simultaneously, **CAI has included a summary at the beginning of the document**. **It outlines and presents the document for the benefit of all readers.** **Where possible, it has also changed certain terms to bring them more into line with the law,** without, however, refraining from using synonyms or simplifications where necessary to facilitate understanding. **Some terms have been added to a glossary at the beginning of the document.** These guidelines do not mark the end of CAI's support efforts, including in matters of consent. **In the future, it could consider the possibility of developing more practical or operational tools.**

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2 – Comment highlights and CAI's responses

CAI

General comments	Responses
11. The guidelines should be split in two to **distinguish between the public and private sectors**.	CAI wanted to create a common document because the criteria for valid consent are identical for both sectors. Many of the concepts presented in the introduction are equally applicable to both the public and private sectors. **However, CAI has moved the examples to the appendix and separated them more clearly between sectors to avoid confusion.**
12. CAI should **review the format** of the document. It could, for example: • Choose other colours to avoid the use of green, which has a positive connotation • Add pictograms • Convert it to HTML format • Present the guidelines in an online application	From the outset, CAI wanted to produce the most user-friendly document possible for the final version. **It has used pictograms in the summary and throughout the document to illustrate the links between the criteria and the importance of meeting them all. It has also replaced the colour coding of the examples with icons.** **Future consideration will be given to improving the visual presentation of the document or its conversion to web format.** As for the use of an online application, CAI is continuing to modernize its digital tools, starting with its website, which will soon be completely revamped.
13. The guidelines should be **harmonized** as much as possible with the guidance provided by CAI's counterparts in other jurisdictions (e.g., at the Canadian federal level).	CAI looks for positions taken by its counterparts on issues relating to its missions. It drew on the guidelines issued by the Office of the Privacy Commissioner of Canada and the European Data Protection Board. **CAI has harmonized its guidelines as much as possible with those of these counterparts but must concentrate on Quebec's laws and their consequences.** They are what the guidelines focus on and what CAI applies.

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Comments on the introduction and the general presentation of the criteria

Comments on the introduction and the general presentation of the criteria	Responses
14. The **purpose** of the guidelines should be stated more clearly, at the outset of the document.	Since these changes contribute to the overall clarity of the document and enable readers to understand the intent behind the guidelines, **CAI has adjusted the introduction accordingly.**
15. Some **concepts should be defined from the outset**, such as "primary" and "secondary" purposes, "personal information," "sensitive personal information," "presumed/express/implied consent" and so on.	Since some concepts are fundamental and are repeated throughout the text, **CAI has added a glossary to introduce them at the outset. Definitions of forms of consent have been repositioned one after the other in Section 2.**
16. The guidelines should **not require organizations to mention uses and disclosures of personal information without consent in their privacy policies or other general documents**. The list of such operations would be too long and complex; all exceptions are likely to be necessary for an organization at some point. Guidance would lead to information overload.	This transparency measure is a best practice that CAI wishes to encourage; **it has been more clearly identified as such**. The law does not provide for the right to object to actions taken without consent, but there are exceptions. It is therefore important that those involved be aware of these uses and disclosures of personal information, so that they can exercise their rights and recourse. **CAI has, however, amended the text to indicate that only those exceptions most likely to be applicable, for example, could be mentioned in general information texts published by organizations.**

2 – Comment highlights and CAI's responses

CAI

Comments on the introduction and the general presentation of the criteria	Responses
17. CAI unduly restricts the **scope of the exceptions** by stating that they are optional. Furthermore, the notion of **irreversibility** of the choice of consent clearly goes beyond the law and should be removed.	Most exceptions to consent, the majority of which existed before Bill 25, are discretionary. This is why lawmakers used the word "may" to introduce them. CAI in no way suggests that exceptions are less valid than consent. However, it does consider it important to point out that there is no right of objection to provide control to those involved in the case of exceptions. CAI's case law has established that exceptions should be interpreted restrictively. Organizations should therefore focus on consent where circumstances permit. **To clarify this message, CAI has revised the wording of the paragraphs involved, placing particular emphasis on the contextual analysis to be carried out.** Where the context permits, an organization may therefore choose to obtain consent. The idea of irreversibility of this choice follows naturally from the very principle of consent as a control tool available to those involved. Special circumstances, such as a major change of context, may sometimes justify this type of action, **but CAI has maintained this general message, focusing on its objective of respecting people's choices**.

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2 – Comment highlights and CAI's responses

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on the introduction and the general presentation of the criteria	Responses
18. The guidelines should not address the issue of **demonstrability**, which is not linked to the criteria for valid consent. If it is maintained, various clarifications should be added, such as how consent is tracked, how long consent must be kept, how the tension between greater demonstrability and limiting collection should be resolved, etc. In addition, the examples of call recording should be clarified.	CAI considers it necessary to briefly address certain fundamental notions related to consent from the outset. Documentation of practices is one of them, especially since it affects the choice of a form of consent (express or implied), for example. **As a result, it has maintained its guidelines, but has made some changes to the wording for the sake of clarification. It has also removed the examples relating to the recording of conversations for the purpose of documenting consent, as the analysis of this type of situation is highly contextual.**
19. CAI should improve the section on **authentication** of a person providing consent, for cases involving minors or for the notion of "reasonable degree of certainty."	Identity verification poses particular challenges in the context of remote services but is not the primary focus of the guidelines. **CAI has, however, specified that a "reasonable level of certainty" must be determined based on the context.** Verifying the age of minors and the relationship between them and the people consenting on their behalf is currently the subject of much debate. **CAI welcomes clarification on this point and may consider the possibility of providing it in the future.** With a view to harmonizing any recommendations with what is being done elsewhere, for the benefit of organizations and individuals, it continues to monitor international work and developments in this area.

2 – Comment highlights and CAI's responses

CAI

Comments on the introduction and the general presentation of the criteria	Responses
20. The **necessity test** applies only to collection. The guidelines go beyond the law by stating that it applies to all stages of the life cycle of personal information.	The use of the word "necessary" in the law is not limited to the collection of information. Case law has consistently established since 2003[4] that necessity is a cross-cutting concept relevant to all stages of the personal information life cycle. **CAI has therefore upheld this assertion, clarifying that it is also based on case law**.
21. The guidelines should not equate the use or disclosure of personal information without consent with a **confidentiality incident**. Provisions on this subject should not apply to consent.	It is true that lawmakers made specific provisions for confidentiality incidents, mainly in response to information security concerns. To narrow the scope of the document, **CAI has removed the relevant paragraph and examples from the guidelines.**
22. CAI should state that consent must **meet only four criteria** (express, free, informed, specific) and that the others are ways of validating that consent.	The initial text of the guidelines indicated that the first four criteria are more fundamental and that the others have a more "instrumental" dimension. Three of them (granular, understandable and separate) relate primarily to the form of the consent *request*. Despite this, the law does not prioritize the criteria and clearly states that consent that is not given in accordance with those criteria is without effect. **CAI has therefore maintained its guidelines in this respect. It has also used the image of puzzle pieces to highlight the importance of all the criteria and the links between them.**

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4 Notably in the *Laval* and *Grenier* cases, decided by the Court of Quebec: *Laval (Société de transport de la Ville de) v. X*, [2003] C.A.I. 667 (C.Q.); *Grenier v. Centre hospitalier universitaire de Sherbrooke*, 2010 QCCQ 9397. Since then, CAI's case law has also moved in this direction.

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on express nature

Comments on express nature	Responses
23. The obligation to inform those concerned of the "means available to activate" **identification, location or profiling functions** is not express consent and should not be addressed in the guidelines. Others argue that if it is, the terms "identification" and "location" should be defined to avoid overly broad application.	The wording of the articles that create this obligation to inform indicates that these functions must be disabled by default. Activating them shows agreement, but with regard to a means rather than an end. **In this respect, CAI now addresses identification, location and profiling functions in the introduction to the guidelines and has clarified its guidance.** **In addition, CAI welcomes clarification of the terms "identification" and "location" and may consider the possibility of providing such clarification in the future.**
24. The different **forms of consent** referred to in the document (presumed, express, implied) are not distinguished clearly enough. Generally speaking, "presumed" consent seems to have been created by CAI.	Changes introduced by Bill 25 do indeed create a legal presumption of consent to the use and disclosure of personal information, for the purposes and to the third parties announced by an organization, when an individual provides this information to the organization after having been duly informed at the time of collection. However, presenting it as a third form of consent could be confusing. **CAI has therefore revised its explanations of this concept in the introduction.**
25. The guidelines should clarify whether **implied consent must meet all validity criteria**.	Implied consent must remain express, just as it must meet the same validity criteria as express consent. **The guidelines are now clearer on this point.**

2 – Comment highlights and CAI's responses

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on express nature	Responses
26. Apart from cases where sensitive information is involved, implied consent is as valid as express consent. CAI should not give **priority to express consent**.	Implied consent may, in some cases, be an acceptable form of consent. However, it may raise issues in terms of documentation and compliance with certain other criteria. That is why CAI used the expression "priority to express consent." **It has made changes to the wording to avoid prioritizing consents on the basis of their *validity*, notably by removing the phrase "priority to express consent." It has also clarified what should be considered before choosing any form of express consent.**
27. Express consent should be validated twice in order to be stronger, e.g., a signed written statement accompanying a checked box. Activating a box is a weak gesture of consent.	The choice of express consent should depend on the context. For example, consent related to sensitive information in the context of services provided in person could be given by means of a signed declaration. **However, given the variety of possible situations, CAI does not wish to promote one method over another, nor increase the already high burden associated with express consent.**
28. CAI should state that **personal information already collected and processed before the majority of the provisions of Bill 25 came into force on September 22, 2023**, is subject to implied consent.	Bill 25 makes no transitional provision in this respect. **CAI cannot set such a general guideline, which could have a significant impact on the rights of individuals, when the specifics of each situation can significantly influence the analysis.** Organizations should consider whether or not new consent is required from those involved, based on their context.

2 – Comment highlights and CAI's responses

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on express nature	Responses
29. The **additional criteria for implied consent** in the guidelines (sensitivity of information, reasonable expectations and risk of harm) are absent from the law and should be removed.	In the guidelines, CAI provides guidance derived not only from the law, but also from relevant case law. These criteria come from a ruling by the Supreme Court of Canada[5] and, although the decision did not address Quebec law, they provide useful guidance for the use of this type of consent. **They have been maintained as a best practice.**
30. The guidelines should make **no reference to implied consent**, which is prejudicial and stems from a misinterpretation of the law.	The fact that consent must be express in the case of sensitive information advocates for recognition of consent that may be implied in other cases. **CAI has already set out a number of guidelines to clearly identify cases where this form of consent is appropriate. It also generally recommends obtaining express consent in its guidelines.**
31. CAI should allow **innovations** such as the use of mechanisms for the single expression of consent or non-consent to multiple organizations at the same time or replace the notion of consent with **voluntary disclosure by individuals**. This would combat consent fatigue.	The guidelines do not prevent organizations from exploring new ways of obtaining consent, as long as they comply with applicable laws. Innovation probably has a role to play in reducing consent fatigue while retaining control over those involved. New models of personal information governance (such as data trusts) or certain technological tools may be of interest in this regard, but CAI cannot rule on the legality of such innovations in the abstract. **It has maintained its guidelines but plans to examine the subject in greater depth as part of its research and recommendations to lawmakers.**

[5] *Royal Bank of Canada v. Trang*, 2016 SCC 50, online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16242/index.do?site_preference=normal>.

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on free nature

Comments on free nature	Responses
32. The guidelines should include limits on the **right to withdraw consent**, such as reasonable notice or reasonable contractual restrictions.	While the terms of withdrawing consent may raise questions, this topic is too specific for the scope of the guidelines on validity criteria. **CAI could consider the possibility of providing guidance on the subject in the future.**
33. The **repetitive nature of a request for consent** does not affect its free nature. A number of contexts (e.g., ethical, commercial) justify such practices. CAI must not unduly restrict them. It could qualify its remarks by referring to an appropriate interval between requests.	Like a growing number of its counterparts elsewhere in Canada and around the world, CAI is concerned about the deceptive strategies used to guide people's choices. In many cases, the relentless, almost harassing repetition of a request for consent creates pressure on the decision and undermines the free nature of consent. **While maintaining this message, CAI has incorporated into the guidelines the idea of a reasonable time interval between requests in order to give organizations a degree of flexibility.**
34. CAI should provide guidance on **"cookie walls,"** i.e., mechanisms that require consent to the deposit of cookies (for advertising purposes) for free access to a site.	While CAI does not encourage this practice, which raises serious questions about freedom of consent, it considers it premature to offer guidance in this regard, in the absence of case law and given the multiple issues involved. The complexity of this issue has been apparent in France for a number of years, notably through the interventions of the National Commission on Computer Technology and Freedom (CNIL) and the State Council. **CAI plans to examine the subject in greater depth as part of its research and recommendations to lawmakers.**

2 – Comment highlights and CAI's responses

Comments on free nature	Responses
35. Given the inherent imbalance in the employer-employee relationship, the guidelines should deal more with **consent in an employment context** and provide clearer directives.	CAI is aware that the employment context presents particular challenges. It is true that other provincial or federal laws set out exceptions or guidance for the use or disclosure of employee information. However, these guidelines deal with Quebec legislation, which does not contain any. The handling of personal information by employers is an issue at the intersection of privacy law and labour law. **CAI has maintained its guidelines but plans to examine the subject in greater depth as part of its research and recommendations to lawmakers.**

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OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on informed nature

Comments on informed nature	Responses
36. The **list of information** to be communicated to ensure consent is informed should be **differentiated between the public and private sectors**. The obligation to provide information in these laws is different. The **information** referred to by CAI goes beyond the law in certain respects (e.g., territory of destination, risks associated with the purpose, etc.). Some of the information mentioned must be **provided *upon request*** according to the legislation.	The guidelines are not intended to provide guidance on how to meet an organization's transparency obligations *when collecting information*. This where there are some slight differences between the public and private sectors. **However, CAI drew on the articles that set out these obligations to indicate what information should be provided before obtaining consent in the form of a unified list. It has added a clarifying paragraph to that effect.** For the same reason, the text does not distinguish between *mandatory* information and information to be provided *upon request* either, as these concepts are applicable to collection. **The notion of levels of information does, however, give organizations flexibility in this respect.**

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on informed nature	Responses
37. The **list of information to be provided is too long** and may confuse those involved.	**CAI believes that this information contributes to a true understanding of the consent sought and reflects the text of the articles of law**. As it points out in the document, it can be given in multiple layers or levels.
38. CAI should remove the notion of **"levels of information"** or associate more clearly each piece of information to be provided with one of these levels.	Information levels are a tool that organizations can use to avoid, in certain cases, duplicating information or overloading consent requests. They are already being promoted in European guidelines on the subject. Organizations are under no obligation to use them. **CAI does not wish to be more prescriptive in this regard, given that this concept is not formally provided for in the law and the distribution of information by level is a contextual decision. The guidelines are now more explicit on the latter point.**
39. The law does not require that the information provided be **"readily available"** at a later date, but only that it be accessible "upon request."	This was more a matter of best practice. **The text has been clarified in this regard.**
40. CAI should give organizations more leeway as to how to fulfill their **duty to assist** those concerned.	The original text was already intended to give organizations all the necessary latitude. **To clarify that the way in which people are assisted is contextual and depends on the activities of each organization, CAI has adapted the wording of its guidance in this regard.**

Comments on specific nature

CAI did not receive any major comments on this criterion.

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on granular nature

Comments on granular nature	Responses
41. CAI should remove the notion of **granularity** from the guidelines. It is incompatible with market reality.	CAI is not at liberty to remove this criterion, formally added by Bill 25. **It has kept it in the text.**
42. The guidelines should provide that **purposes can be grouped together "in blocks"** if they are interrelated. They should specify that the granularity criterion applies only to secondary purposes. They should also explain how granular consent reconciles with the notion of **consent fatigue**.	Many comments were made about the possibility of grouping purposes into blocks. This is not what the law provides. It is clear that consent must be sought for each purpose. However, some comments received indicated that organizations were concerned about having to duplicate the entire consent submission for each purpose. **CAI has added clarifications to dispel this impression.** It is also true that there can be a tension between granularity and consent fatigue. **In CAI's view, this tension stems from the law, which continues to give consent an important role. CAI believes these comments are directed more to lawmakers.**

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Comments on understandable nature

Comments on understandable nature	Responses
43. CAI should revise its guidelines on the **language used** to communicate information to those concerned in order to avoid any confusion with the *Charter of the French Language*.	CAI accepts this call for caution, especially since the *Charter* applies differently to the private and public sectors. **It has made changes accordingly.**
44. The guidelines should encourage organizations to **write simply and clearly** *for a majority of people* rather than *all people* in absolute terms. The current guidelines are too restrictive and difficult to apply.	CAI agrees that it is more proportional to aim for a high level of understanding and simple, clear terms for a majority of people. It recognizes that the legal duty to assist will also address the more specific needs of people who may have difficulty understanding certain information before giving or withholding consent. **It has therefore adjusted the text accordingly.**

Comments on temporary nature

Comments on temporary nature	Responses
45. CAI should review its guidelines to avoid turning the **limited duration of consent into an obligation to be transparent about its duration**.	The temporary nature of consent is set out in law as an intrinsic feature, not as an obligation of transparency. However, this seems essential in many cases to ensure that consent is informed and specific. **CAI has adjusted the wording of certain paragraphs in the section on temporary nature to clarify that this is a best practice.**

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Comments on temporary nature	Responses
46. The guidelines should be revised to better distinguish between the **length of time consent is valid** and the **length of time information is kept**, as these are two different concepts.	These two concepts can indeed be confused with each other. However, they are distinct. **CAI has included a paragraph to highlight the differences between them and clarify the section concerned.**
47. CAI should provide **guidance on how long personal information should be kept**.	This is a complex and contextual topic that falls outside the intended scope of the guidelines on the criteria for valid consent. **However, CAI will consider the possibility of setting out specific guidelines for it in the future.**
48. Since the law does not require regular reminders to be sent to those concerned in the case of **long-term consents**, CAI should withdraw this guideline.	The guidance provided in this respect was more a matter of best practice. **CAI has clarified this intention in the text of the guidelines.**

Comments on separate nature

CAI did not receive any major comments on this criterion.

OSER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on the examples

Comments on the examples	Responses
49. CAI should **remove the examples from the document**. Some feel that they are very specific, and therefore not very useful. Others feel that they make an already long and complex document more cumbersome to read. Lastly, one commentator suggested replacing them with a case law review by theme.	Given the inherent complexity of the subject of consent, CAI wants to provide a variety of examples to illustrate some of its guidelines. The European Data Protection Board, for example, also follows this practice. The 51 examples presented were based on case law, practices observed during oversight or practices identified in CAI's monitoring activities. This explains their specific nature, especially as the situations presented have sometimes been modified to illustrate the rules more clearly. For CAI, this specific nature is generally essential to understanding the context. Moreover, the examples can provide only a partial picture of the situation, since the laws covered by the guidelines apply to virtually all organizations in Quebec. **CAI believes that most of the examples are still relevant and can be used as a basis for reflection by organizations. However, as noted below, it has made numerous changes to clarify them. It has also removed some examples that raised more questions and comments than they clarified.** **The examples have also been moved to the appendix.** This decision may be reviewed based on future thoughts on adapting the format of the guidelines. Lastly, the examples are shorter and more directed than full decisions. What's more, current case law does not yet take into account the legislative changes introduced by Bill 25. **For these reasons, CAI has not added any references to previous case law. However, over time, it will consider the possibility of incorporating references to future decisions into the guidelines.**
50. CAI should make it clear that the **examples are only illustrations** and that it will conduct a case-by-case analysis as part of its monitoring activities.	CAI intended that the examples illustrate possible cases and *courses* of action where situations might not be in compliance. They are not intended to illustrate the only way to act in a given situation, nor to provide a definitive answer to any similar situation. In its monitoring activities, CAI always analyzes the specific facts of a case, taking into account the context. **It has clarified the intent of the examples in the text.**

2 – Comment highlights and CAI's responses

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

Comments on the examples	Responses
51. CAI should make a **clear distinction between what is legal and what is not**, to avoid confusion. Where possible, it should indicate what the organization in the example could do to remedy a compliance problem.	The examples were categorized as "A priori compliant practices," "A priori non-compliant practices" or "Practices whose compliance may vary according to context." **As this classification caused some confusion, CAI has removed it. Wherever possible, each example has been clarified as to the legality of the practices described, and potential solutions have been included to remedy the problems described.**
52. Examples relating to **specific business sectors** should be reviewed with stakeholders from the industries concerned to ensure they are realistic. On the other hand, some suggest that CAI should generalize the examples and remove industry-specific facts to avoid perpetuating stereotypes in some cases.	Some examples could certainly be refined through discussions with specialists. However, the time required to do this would delay publication of the guidelines. **This exercise may be considered for future updates.** The choice of certain business sectors is not intended to stigmatize them, but rather to explain the consequences of the law in relation to certain common practices. Many examples cannot be generalized without losing the nuances that make them relevant. **Where possible, however, CAI has removed some specificities from the examples.**
53. CAI should **add examples specific to certain sectors** (e.g., research, philanthropy, education, etc.).	Since many stakeholders criticized the already large number of examples, that any selection of situations is necessarily partial and that the guidelines were to be published in due course, **CAI has not added any examples to the document**. As previously mentioned, **in the future it could examine the possibility of providing more specific guidance for certain sectors.**

2 – Comment highlights and CAI's responses

CAI

CAI also received numerous specific comments on many of the examples presented in its document. The following changes have been made as a result of these comments:

- Some particularly criticized examples relating to privacy incidents, demonstrability, consent fatigue, sensitive information or e-commerce were removed.
- The example on necessity was simplified.
- Clarity was added to some examples, in particular to avoid implying that exceptions to consent could have applied.
- Certain passages that implied that practices were obligations rather than best practices were removed or changed.
- Changes were made to ensure consistency between examples and guideline orientations.

OSLER UNOFFICIAL TRANSLATION OF CAI GUIDANCE

3. Next steps

The final version of the guidelines will be published on October 31, 2023. This document may be revised in the future. In such case, CAI will inform the public.

In order to assess its consultation process, CAI invites interested individuals and organizations, particularly those who took part in the consultation, to comment on this public participation initiative. Suggestions may also be submitted for future consultations. Simply complete the questionnaire on the Consultation Québec platform. The questionnaire will be active until **December 15, 2023**.

The data collected, as well as the various observations made during the process, will help CAI assess this initial guideline development exercise. Future consultations could, for example, be held using different consultative methods.

Lastly, CAI has received a number of suggestions concerning topics for future guidelines. It will take these into account when planning its future work.

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Appendix 1 – List of briefs received

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Number	Stakeholder	Type	Link
ME_01	Barreau du Québec	Public sector	Brief
ME_02	Insurance Bureau of Canada	Private sector	Brief
ME_03	Secrétariat à la réforme des institutions démocratiques, à l'accès à l'information et à la laïcité	Public sector	Brief
ME_04	Ligue des droits et libertés	Civil society	Brief
ME_05	Fédération des centres de services scolaires du Québec	Public sector	Brief
ME_06	Canadian Marketing Association	Private sector	Brief
ME_07	Fédération des chambres de commerce du Québec	Private sector	Brief
ME_08	Conseil du patronat du Québec	Private sector	Brief
ME_09	Interactive Advertising Bureau of Canada (IAB Canada)	Private sector	Brief
ME_10	Borden Ladner Gervais, LLP (Privacy and Data Protection Group)	Private sector	Brief
ME_11	Canadian Bankers Association	Private sector	Brief
ME_12	International Observatory on the Societal Impacts of AI and Digital Technology (OBVIA)	Academic experts	Brief
ME_13	Option consommateurs	Civil society	Brief
ME_14	Canadian Life and Health Insurance Association	Private sector	Brief
ME_15	Fasken Martineau DuMoulin, LLP (National Privacy and Cybersecurity Group)	Private sector	Brief
ME_16	Gowling WLG (Canada), LLP (National Cybersecurity and Data Protection Group)	Private sector	Brief
ME_17	Association of Access to Information and Privacy Professionals (AAPI)	Public sector	Brief
ME_18	Fonds de recherche du Québec	Public sector	Brief
ME_19	Association of Fundraising Professionals – Quebec Chapter	Private sector	Brief
AUT_01	Desjardins Group	Private sector	Brief
AUT_02	Osler, Hoskin & Harcourt LLP (AccessPrivacy team)	Private sector	Brief
AUT_03	Digital Advertising Alliance of Canada (DAAC)	Private sector	Brief

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